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Rule 23. Class Actions.

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. At an early practicable time after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. For purposes of this subdivision, "practicable" means reasonably capable of being accomplished. An order under this section may be altered or amended at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.

(c) Notice. (1) In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

(2) The notice must concisely and clearly state in plain, easily understood language:

- * the nature of the action,
- * the definition of the class certified,
- * the class claims, issues, or defenses,
- * that a class member may enter an appearance and participate in person or through counsel if the member so desires,
- * that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- * the binding effect of a class judgment on class members.

(3) In any class action in which no monetary relief is sought, the court may require any notice it deems appropriate in the circumstances.

(4) The cost of any notice shall be borne by the representative parties; provided, however, that the court may shift all or part of the cost to the opposing party or parties if the case is

settled or the class representative substantially prevails on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dividing the class into subclasses, treating each subclass as a class, and construing and applying the provisions of this rule accordingly; and (6) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) Dismissal or Compromise. (1) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court may approve any such resolution that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) The court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval. An objection may be withdrawn only with the court's approval.

Reporter's Notes (as modified by the Court) to Rule 23: - 1. Class actions in Arkansas have been governed by Ark. Stat. Ann. 2-809 (Repl. 1962) which provide minimum procedural rules. This rule does not change prior law.

2. Rule 23 confers broad discretion upon the trial court to dictate such terms as are necessary to protect the rights of absent class members. This discretion is also conferred upon the federal courts by FRCP 23.

3. In Arkansas, many of the class action cases have involved actions brought by and against members of unincorporated associations such as labor unions. *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *International Brotherhood v. Blassingame*, 226 Ark. 614, 293 S.W.2d 444 (1956). See also *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960). Such actions shall henceforth be brought pursuant to Rule 23.2.

4. Under prior Arkansas law, class actions could be maintained in either law or equity. *Thomas v. Dean*, *supra*. This rule does not affect jurisdiction and thus such actions may still be maintained in either court.

Addition to Reporter's Note, 1990 Amendment: - Subdivision (a) has been completely

rewritten to set out the requirements for numerosity, commonality, typicality, and adequate representation. As revised, subdivision (a) is identical to the corresponding federal rule. Former subdivision (c) has been modified slightly and redesignated as subdivision (e). Under the revised version, which is based on the corresponding federal rule, notice of a proposed dismissal or compromise is mandatory rather than discretionary. New subdivision (c) requires that the best practicable notice of the pendency of class actions seeking monetary relief, whether legal or equitable, be given to all class members. Among other things, the notice must advise class members of their right to participate in or be excluded from the litigation. When monetary relief is sought, class members must, as a matter of due process, be given such notice and afforded the opportunity to "opt out" of the class action. See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). It is not clear from *Shutts* whether due process requires such notice when the class action involves only injunctive or declaratory relief. *Id.* at 811, n. 3. Subdivision (c) does not impose such a requirement in such circumstances, but the trial court may, pursuant to subdivision (d), order that notice be given. The last sentence of subdivision (c) makes clear that the class representatives must initially bear the cost of the notice, though such cost may ultimately be shifted to the opposing parties. This practice is followed in the federal courts. See *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Subdivision (d) has been revised to take into account the foregoing changes and to spell out in further detail the trial court's discretion in the management of a class action. It is virtually identical to the corresponding federal rule.

Addition to Reporter's Note, 2006 Amendment: - All parts of the Rule have been revised. Many of these changes echo recent amendments to Federal Rule of Civil Procedure 23, while others incorporate the holding of recent Arkansas decisions and current Arkansas practice. With a few exceptions, the changes are technical and do not change Arkansas law.

Another prerequisite - the adequacy of class counsel - has been added to subdivision (a). This addition conforms the Rule to Arkansas law. E.g., *Mega Life & Health Insurance Co. v. Jacola*, 330 Ark. 261, 275, 975 S.W.2d 898, 904 (1997). Relevant factors for the circuit court's evaluation of class counsel include: counsel's work identifying and investigating potential claims, counsel's experience in handling class actions, complex litigation, and claims of the type asserted; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. See generally, Federal Rule of Civil Procedure 23(g). Unless a showing is made to the contrary, however, Arkansas law presumes that the class representative's counsel "will vigorously and competently pursue the litigation." *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 80, 76 S.W.3d 243, 247 (2002).

Subdivision (b) on the timing of the circuit court's certification decision has been amended. The former rule required a certification decision as soon as practicable after the lawsuit commenced. That requirement, however, neither captured the prevailing practice nor recognized the good reasons for delaying the certification decision, such as the need for limited discovery on the Rule 23(a) prerequisites. The revised Rule requires a decision on certification at an early practicable time, which is the current standard in the federal Rule. That standard gives the circuit court and the parties some flexibility, while leaving intact the settled Arkansas law that the court may not inquire into the merits at the certification stage. E.g., *Speights v. Stewart Title Guaranty Co., Inc.*, - Ark. -, -, S.W.3d -, -, 2004 WL 1354279 (30 September 2004) (Supplemental Opinion Denying Rehearing).

The amendment deletes the phrase "may be conditional" from the part of subdivision (b) authorizing the circuit court to alter or amend a certification order. The deleted phrase is superfluous; the Arkansas cases on point have emphasized the circuit court's power to

reconsider, affirm, alter, modify, or withdraw certification. E.g., *Fraley v. Williams Ford Tractor and Equipment Co.*, 339 Ark. 322, 347, 5 S.W.3d 423, 438-39 (1999). All of these actions spring from the power to alter or amend a certification order. This change brings the Arkansas Rule back into conformity with the federal Rule.

The amendment also replaces the phrase "before the decision on the merits" in subdivision (b) with the phrase "at any time before the court enters final judgment." This change follows an amendment to the federal Rule; it better reflects the duration of the circuit court's authority to modify its certification decision; and it should give the circuit court greater flexibility to deal with developments late in the litigation but before final judgment.

A new sentence has been added to the end of subdivision (b). As the cases make plain, the certification order must define the class in sufficiently definite terms so that the court and the parties may identify the class members. E.g., *Ferguson v. Kroger*, 343 Ark. 627, 631-32, 37 S.W.3d 590, 593 (2001). Identifying the claims, issues, and defenses will likewise help in identifying class members and expedite the resolution of the litigation. The amendment tracks existing Arkansas law and the federal Rule. This amendment does not alter the precedent holding that the circuit court is not required to perform a rigorous analysis of the case at the certification stage. E.g., *THE/FRE, Inc. v. Martin*, 349 Ark. 507, 514, 78 S.W.3d 723, 727 (2002). But the circuit court must "undertake enough of an analysis to enable [the appellate court] to conduct a meaningful review." See *Lenders Title Co. v. Chandler*, 353 Ark. 339, 349, 107 S.W.3d 157, 162 (2003).

Subdivision (c) on notice has been rewritten and divided into subparts. The changes specify the contents of the notice in clearer terms, make a plain-statement requirement for the notice explicit, and bring the Arkansas Rule in line with the comparable federal Rule. A provision explicitly authorizing the circuit court to require notice in class actions where no monetary relief is sought has also been added. All these revisions are technical and do not change Arkansas law.

A new sentence (5) has been added to subdivision (d) to recognize the circuit court's authority to create subclasses. The Arkansas cases have assumed this authority, and implicitly approved it, for almost twenty years. E.g., *Int'l Union of Ethical, Radio and Machine Workers v. Hudson*, 295 Ark. 107, 117, 747 S.W.2d 81, 86-87 (1988); *State Farm Fire & Casualty Co. v. Ledbetter*, 355 Ark. 28, 35-36, 1295 S.W.3d 815, 820-21 (2003). The federal Rule authorizes subclasses, which are often useful. This change conforms the Rule to current Arkansas practice. Former sentence (5) has been renumbered as (6).

Subdivision (e) about dismissal and compromise has been rewritten. With some exceptions, the revised Rule restates Arkansas law in the clearer terms of Federal Rule of Civil Procedure 23(e) and incorporates current Arkansas practice. For example, proposed settlements are evaluated now for fairness, reasonableness, and adequacy. *Ballard v. Martin*, 349 Ark. 564, 79 S.W.3d 838 (2002). Subdivision (1) also requires the circuit court to hold a fairness hearing before approving any proposed settlement. This is a new requirement, though fairness hearings are routine in most class actions. Subdivision (2) requires the parties seeking approval of any settlement to file a statement identifying side agreements. This new requirement will promote fairness in settlements and mirrors the federal Rule. Subdivision (3) gives the circuit court discretion to open a second opt-out window if the circumstances justify it. The federal Rule contains this option, and it merely recognizes the circuit court's power to fashion all appropriate relief as part of approving any proposed settlement. Finally, subdivision (4) requires court approval before an objection may be withdrawn. Objections often can, and

should be, resolved by the parties. This new requirement, also drawn from the federal Rule, will help the circuit court insure the fairness of those resolutions in light of the overall proposed settlement of the litigation.

History Text:

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Rules of Civil Procedure

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IV. Parties

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